



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 7, 2005

Ms. Karol H. Davidson
Staff Attorney
Texas Youth Commission
P.O. Box 4260
Austin, Texas 78765

OR2005-02985

Dear Ms. Davidson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 221611.

The Texas Youth Commission (the "commission") received two requests for information regarding investigations into allegations of misconduct, assault, or other wrongdoings by juvenile correction officers at the Evins Detention Center during October, November, and December of 2004. You state that you have provided one of the requestors with a portion of the requested information. You claim, however, that the remaining requested information is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the commission's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. The commission failed to submit Attachment C within the fifteen business day deadline as required by section 552.301(e) of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to timely submit to this office the information required in section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake, or when information is confidential under other law. Open Records Decision No. 150 (1977). Because sections 552.101 and 552.102 can provide compelling reasons to withhold information, we will address your claims under these exceptions.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Section 261.201 provides in part:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). We note that the commission is authorized to conduct an investigation under chapter 261. *See* Fam. Code § 261.401(b) (state agency that operates, licenses, certifies, or registers facility in which children are located shall make prompt, thorough investigation of report that child has been or may be abused, neglected, or exploited in facility). Having reviewed the submitted information, we agree that most of the submitted information constitutes files, reports, records, communications, and working papers used or developed in an investigation made under chapter 261 of the Family Code. The commission has adopted rules concerning investigations of alleged abuse, neglect, or exploitation. *See id.* § 261.409 (commission by rule shall adopt standards for investigation under section 261.401 of Family Code); *see also* 37 T.A.C. § 93.33. However, you do not indicate, and we are not otherwise aware, that either of the requestors in this instance has a right of access to this particular information under the commission's rules. Accordingly, we conclude that the commission must withhold the information we have marked pursuant to section 552.101

of the Government Code in conjunction with section 261.201 of the Family Code. We find, however, that the remaining submitted information does not constitute files, reports, records, communications, or working papers used or developed for the purposes of chapter 261. Thus, none of the remaining information may be withheld on this basis.

You also indicate that the names of the officers and the names of the juveniles in Attachment B are excepted from disclosure pursuant to section 552.101 in conjunction with section 61.073 of the Human Resources Code. Section 61.073 provides:

The commission shall keep written records of all examinations and conclusions based on them and of all orders concerning the disposition or treatment of each child subject to its control. Except as provided by Section 61.093(c), these records and all other information concerning a child, including personally identifiable information, are not public and are available only according to the provisions of Section 58.005, Family Code, Section 61.0731, Human Resources Code, and Chapter 61, Code of Criminal Procedure.

Hum. Res. Code § 61.073.¹ The information in Attachment B consists of records relating to children in the custody of the commission.² Based on our review of Attachment B, we find that section 61.073 is applicable to the names of the juveniles in Attachment B. Accordingly, we conclude that the commission must withhold these names, which we have marked, pursuant to section 552.101 of the Government Code in conjunction with section 61.073 of the Human Resources Code. However, the commission has failed to establish, and we are unable to determine, how section 61.073 applies the names of the officers in Attachment B. Thus, the officers' names may not be withheld on this basis.

¹ We note that section 61.093(c) of the Human Resources Code authorizes the disclosure of information relating to a child who has escaped from custody. We also note that section 61.0731 of the Human Resources Code authorizes the disclosure of information concerning a child to the child and the child's parent or guardian, if disclosure would not materially harm the treatment and rehabilitation of the child and would not substantially decrease the likelihood of the commission receiving information from the same or similar sources in the future. Further, we note that section 58.005(a) of the Family Code provides that information obtained for the purpose of diagnosis, examination, evaluation, or treatment of a child by an agency providing supervision of a child by arrangement of the juvenile court or having custody of the child under order of the juvenile court may be disclosed only to certain specified persons or under certain specified circumstances. In addition, we note that chapter 61 of the Code of Criminal Procedure governs information pertaining to criminal combinations and criminal street gangs. The commission does not indicate that it is authorized to release any portion of the remaining submitted information under sections 61.0731 or 61.093 of the Human Resources Code, section 58.005(a) of the Family Code, or chapter 61 of the Code of Criminal Procedure.

² We note that for purposes of chapter 61 of the Human Resources Code, a "child" is a person less than 21 years old.

Finally, the commission raises section 552.102 of the Government Code. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102. In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101. Consequently, we will consider these two exceptions together.

In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if it (1) contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. 540 S.W.2d at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Upon review of the remaining submitted information, we conclude that none of it is protected by common law privacy. See Open Records Decision Nos. 659 at 5 (1999) (listing types of information that attorney general has held to be protected by right to privacy), 423 at 2 (1984) (explaining that because of greater legitimate public interest in disclosure of information regarding public employees, employee privacy under section 552.102 is confined to information that reveals "intimate details of a highly personal nature"). Thus, none of the remaining submitted information may be withheld under either section 552.101 or section 552.102 on the basis of common law privacy.

We note, however, that a portion of the remaining information may be confidential under section 552.117 of the Government Code.³ Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. See Gov't Code § 552.117(a)(1). However, information subject to section 552.117(a)(1) may not be withheld from disclosure if the current or former employee made the request for confidentiality under section 552.024 after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is made. See Open Records Decision No. 530 at 5 (1989). For employees who timely elected to keep their personal information confidential, you must withhold this information, which we have marked, under

³ The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

section 552.117(a)(1) of the Government Code. The commission may not withhold this information under section 552.117(a)(1) for employees who did not make a timely election to keep the information confidential.

In summary, the commission must withhold the information we have marked under section 552.101 in conjunction with section 261.201 of the Family Code. The commission must withhold the information we have marked in Attachment B under section 552.101 in conjunction with section 61.073 of the Human Resources Code. Finally, the commission must withhold the marked section 552.117 information in Attachment C for commission employees who made a timely election pursuant to section 552.024. The remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Lauren E. Klein
Assistant Attorney General
Open Records Division

LEK/jev

Ref: ID# 221611

Enc. Submitted documents

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